A & T Manufacturing Company *and* United Steelworkers of America, AFL-CIO-CLC. Cases 9-CA-15756, 9-CA-15898, and 9-CA-16029

December 16, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On November 4, 1981, Administrative Law Judge David L. Evans issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Respondent violated Section 8(a)(3) and (1) of the Act by laying off 25 shop employees in response to the Union's attempt to organize Respondent's employees, but did not violate Section 8(a)(3) and (1) by discharging field employees Delbert Colwell and Jimmy Popp. The Administrative Law Judge also found that Respondent violated Section 8(a)(1) by threats of plant closure or discharge, interrogation, promulgation of overly broad no-solicitation rules, and threats to conduct surveillance, and the actual surveillance, of union meetings. Respondent excepted to the Administrative Law Judge's finding that it violated Section 8(a)(3) by laying off its shop employees, and the General Counsel excepted to the Administrative Law Judge's failure to find that the discharges of Colwell and Popp violated the Act. We find merit in the General Counsel's exception as to Popp's discharge, and in all other respects adopt the Administrative Law Judge's findings.[2]

The record reveals that Respondent employed Popp as an electrician on its field crew from May 1978 until his discharge on September 23, 1980.[3] Popp was an active union supporter, and Respondent knew of Popp's union adherence.[4] On September 23, Respondent's president, Charlie Browder, discharged Popp allegedly for insubordination and absenteeism. According to Browder, sometime in mid-September he learned that on August 27, during the course of a conversation with two supervisors, Popp referred to one of them as a "brown nose suck ass." The Administrative Law Judge found that Browder learned of this incident in mid-September, although his testimony was vague as to how he learned of the alleged insubordination or the steps he took to confirm this information.[5] Nevertheless, Browder decided in mid-September to discharge Popp for the insubordination, but did not do so until September 23 because Popp was absent from work until that date. During the conversation in which Browder informed Popp of the discharge, Browder cited as reasons for the discharge Popp's insubordination on August 27 and his absences.[6]

The Administrative Law Judge found that Respondent's reliance on the August 27 insubordination as a reason for the discharge was clearly pretextual, since Browder did not act on this incident until 27 days after the alleged insubordination; he found that Respondent's failure to discipline Popp expeditiously demonstrated condonation of his conduct. However, the Administrative Law Judge found that Respondent had a valid reason to discharge Popp—his excessive absences. He found that Popp was absent for 5 days in a row without calling in and that such absences are a violation of Respondent's rule which provides that an employee must phone the Company on each day of absence. Thus, he concluded that Respondent relied on Popp's absenteeism as a sufficient cause for the

[1] Respondent has requested oral argument. This request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] No exceptions were taken to the Administrative Law Judge's findings of violations of Sec. 8(a)(1). However, the General Counsel excepted to the Administrative Law Judge's failure to include in the recommended Order a requirement that Respondent cease and desist from informing employees that their fellow employees were laid off because of the Union. As the Administrative Law Judge found that Respondent violated Sec. 8(a)(1) in this manner, we find merit in the General Counsel's exception and shall correct the Conclusions of Law, the recommended Order, and the notice to reflect this finding.

In addition, the General Counsel excepted to the Law Judge's failure to include in the notice language regarding the reinstatement of unlawfully laid-off employees which conforms with his recommmended Order. We find merit in this exception and shall conform the notice to the recommended Order.

[3] Unless otherwise noted, all dates hereinafter are in 1980.

[4] On two occasions prior to his discharge, Respondent's supervisors unlawfully interrogated Popp about his union activity. In addition, approximately 3 weeks before Popp's discharge, he met with Respondent's president, Charlie Browder, who informed him that Respondent knew of Popp's activity on behalf of the Union and warned him not to engage in such activity on Respondent's time or property; this warning was found to be unlawful. As noted above, Respondent did not except to any of these findings.

[5] For example, although Browder testified that he "confirmed" the report of this incident from one of the supervisors involved, the Administrative Law Judge found that Browder did not obtain a written statement from that supervisor until after Popp was fired.

[6] The Administrative Law Judge found that Popp was absent for 5 consecutive workdays without calling in. However, a transcript of the September 23 meeting, made by Respondent and quoted by the Administrative Law Judge, reveals that Popp called in on the first 2 days of his absence but did not call in on any of the next 3 days.

discharge and that, therefore, his discharge did not violate the Act.[7]

We disagree with the Administrative Law Judge's conclusion that Respondent relied on Popp's absenteeism as a reason for his discharge. Browder's testimony, credited by the Administrative Law Judge, makes it clear that Browder decided to discharge Popp *before* Popp's absences.[8] Thus, we find that Respondent based its decision to discharge Popp solely on Popp's alleged insubordination. As we agree with the Administrative Law Judge that reliance on this incident as a reason for the discharge is pretextual, we find that Popp's discharge violated the Act, and will direct that he be reinstated with backpay.

We also agree with the Administrative Law Judge that Delbert Colwell was lawfully discharged by Respondent for excessive absenteeism. We do not quarrel with our dissenting colleague's discussion of Respondent's demonstrated animus against the Union as well as Respondent's awareness of Colwell's union activities. However, our colleague minimizes the problems which Colwell had long experienced with showing up for work.

Colwell began work for Respondent in May. On July 9, he asked Project Superintendent Shepherd for a wage increase. Shepherd told him that he had not placed himself in a good position for a raise because "he had not attended work, and if he doesn't attend work, I [Shepherd] can't evaluate his performance and recommend him for a raise." Colwell had, by this time, been absent a number of times without calling in. In spite of this advice, Colwell incurred several more unexcused absences from work. On July 30, Shepherd again counseled Colwell on his absenteeism and read verbatim from Respondent's policy handbook the rule on absences and tardiness, thus advising Colwell that unreported, unexcused, or excessive absences were grounds for dismissal. Colwell was admonished that he needed to improve his attendance record. Shepherd's notes on these two counseling sessions were placed in Colwell's personnel file.

On August 26, Shepherd discharged Colwell after asking him why he had not been at work the day before. Colwell provided no excuse and no reason why he had failed to report his absence. Shepherd reminded him of their prior discussions concerning Colwell's attendance problems and then discharged Colwell because these problems could no longer be tolerated.

At all times herein, Colwell was in a 90-day probationary period during which he could be fired for any reason. On July 28, Shepherd recommended that Colwell be reclassified from a laborer to a welder. Shepherd testified that reclassification is a reflection of a person's capabilities and that attendance is not necessarily a factor to be considered. Reclassification does carry with it a pay raise. However, Respondent's procedure is to approve a pay raise prior to approving the reclassification. Colwell's pay raise was never approved and, thus, he was never reclassified. Additionally, Respondent's rules do not specify how many absences need be incurred before an employee is discharged. It is left to Respondent to determine at what point a discharge is justified.

Based on all of the above and mindful of Colwell's union activities and Respondent's knowledge thereof, we are of the opinion that Respondent's reason for discharging Colwell was a lawful one. Of particular importance is the fact that Colwell was twice warned about his attendance problem and denied a pay raise prior to the start of *any* union activity.[9] Respondent never ignored or condoned Colwell's behavior, but repeatedly counseled him in an effort towards its improvement. When the expected improvement was not forthcoming, Respondent legitimately exercised its right to let Colwell go.[10] Accordingly, we find that Respondent did not violate the Act by discharging Delbert Colwell.

CONCLUSIONS OF LAW

1. A & T Manufacturing Company is an employer engaged in commerce or in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

[7] Chairman Van de Water concurs in the Administrative Law Judge's assessment that Popp's consecutive days of absence, whether that number be 3 or 5, would have resulted in his discharge in any event, and, therefore, he would not order Popp reinstated nor would he grant him backpay. He does so because the intervening events (Popp's absences) render any remedial order here inappropriate.

[8] In response to questions posed by counsel for the General Counsel, Browder testified:

> Q. So any absence he had after you decided to discharge him, that wasn't why you discharged him?
>
> A. I made the decision to discharge him at the time I heard he had insulted my foreman, however, I would have discharged him anyway for missing that many days in a row without even following company procedure on it.
>
> Q. But as it was, you have already decided to fire him before any absence he might of [sic] had after that—the only reason you didn't tell him he was fired earlier, was that he wasn't there.
>
> A. Correct.

[9] Since our dissenting colleague has referred to the discharge of Popp, we note that the decision to discharge Popp was made *before* Popp incurred the 5-day absence relied on by Respondent for his discharge.

[10] We note the uncontroverted record evidence that Respondent has discharged numerous employees in the past for unexcused or excessive absenteeism, frequently within those employees' first few months of employment.

3. By interrogating its employees about their union activities, sympathies, or desires concerning representation by United Steelworkers of America, AFL-CIO-CLC; by threatening employees with plant closure, discharge, or other discrimination because of their known or suspected union activities; by informing employees that their fellow employees were laid off because of their activities on behalf of the Union; by threatening to conduct surveillance of union meetings and conducting surveillance of union meetings; by warning employees not to sign union cards; and by imposing overly broad no-solicitation and no-distribution rules upon its employees, Respondent has violated Section 8(a)(1) of the Act.

4. By laying off the following named employees because of their known or suspected activities on behalf of the Union and/or because of a desire to discourage activity on behalf of the Union, Respondent has discriminated against its employees in violation of Section 8(a)(3) and (1) of the Act:

Wayne Adams	Roscoe Johnson
Darrell Boggs	Billy Joe Leedy
Curt Brock	Beecher Morris, Jr.
Ernest Brock	Curt Morris
Curtis Brown	Danny Osborne
Carl Campbell	Delmar Scott
Roland Campbell	Melvin Sebastien
James Combs	Jerry Sexton
Michael Combs	Jimmy Sizemore
Johnny Everidge	Jerome Swalec
Lloyd Eversole	Daniel Watkins
Ezekiel Feltner	Taylor Whitehead
Rudolph Honeycutt	

5. By discharging employee Jimmy Popp on September 23, 1980, because of his known or suspected activities on behalf of the Union and/or because of a desire to discourage activities on behalf of the Union, Respondent has discriminated against Popp in violation of Section 8(a)(3) and (1) of the Act.

6. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent has not violated the Act by discharging employee Delbert Colwell on August 26, 1980.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, A & T Manufacturing Company, Jeff, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge, plant closure, or other discrimination because of their known or suspected activities on behalf of United Steelworkers of America, AFL-CIO-CLC.

(b) Informing employees that their fellow employees were laid off because of their activities on behalf of the Union.

(c) Interrogating employees about their activities on behalf of the Union.

(d) Promulgating or maintaining in effect unlawful no-solicitation or no-distribution rules.

(e) Threatening to conduct and conducting surveillance of union meetings.

(f) Warning employees not to sign union cards.

(g) Laying off or discharging employees in order to discourage membership in or activities on behalf of the Union.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer the following named employees immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole, with interest, for any loss of earnings and/or benefits suffered by reason of their unlawful layoff on August 22, 1980:

Wayne Adams	Roscoe Johnson
Darrell Boggs	Billy Joe Leedy
Curt Brock	Beecher Morris, Jr.
Ernest Brock	Curt Morris
Curtis Brown	Danny Osborne
Carl Campbell	Delmar Scott
Roland Campbell	Melvin Sebastien
James Combs	Jerry Sexton
Michael Combs	Jimmy Sizemore
Johnny Everidge	Jerome Swalec
Lloyd Eversole	Daniel Watkins
Ezekiel Feltner	Taylor Whitehead
Rudolph Honeycutt	

(b) Offer employee Jimmy Popp immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole, with interest, for any loss of earnings and/or benefits suffered by reason of his unlawful discharge on September 23, 1980.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and reports and all other

records necessary for determination of the amounts owing under the terms of this Order.

(d) Post at its Jeff, Kentucky, place of business copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

MEMBER JENKINS, dissenting in part:

I agree with the Administrative Law Judge that Respondent engaged in extensive violations of Section 8(a)(3) and (1). I also agree that Respondent violated Section 8(a)(3) and (1) by discharging employee Jimmy Popp, and that Popp should be reinstated with backpay. Contrary to my colleagues, however, I would also find that Respondent unlawfully discharged employee Delbert Colwell.

The events leading to Colwell's discharge occurred within a brief time frame. As found by the Administrative Law Judge, Respondent's employees began discussing unionization in mid-August 1980. The Union conducted an employee meeting on August 20, and on August 21 employees discussed the Union among themselves at Respondent's facility. Respondent immediately became aware of the organizing drive, and its response was decisive and uncompromising. On August 22, Respondent laid off 25 of its 27 shop employees in violation of Section 8(a)(3) and (1). Beginning on or about August 21, Respondent engaged in extensive violations of Section 8(a)(1), including shop closure and discharge threats, interrogations, surveillance, and the imposition of an overly broad no-solicitation and no-distribution rule. On August 25, the Union requested recognition as the employees' collective-bargaining representative.

Colwell was prominent in the organizing drive,[12] and the Administrative Law Judge found that Respondent had knowledge of his union activities by August 21.[13] On August 26, Respondent discharged Colwell, allegedly for "excessive absenteeism," after Colwell failed to call in and report his absence on the previous day. Respondent relied on its absenteeism rule, which provides that employees must telephone Respondent to report an absence, and that "unreported," unexcused," or "excessive" absences "will result in dismissal."

In adopting the Administrative Law Judge's findings, the majority has ignored the overwhelming evidence that Respondent's discharge of Colwell was motivated solely by his union activity. Thus, as found by the Administrative Law Judge, Supervisor Riley conveyed to employees the threat of Respondent's president, Charlie Browder, to fire any employee who spoke about the Union or who signed a union card. On August 21, Colwell informed Supervisor Callahan that he intended to solicit employees to sign authorization cards, and Callahan responded, "Don't you know that they will fire you the first chance they get if you get the card signed." On August 25, the day before Colwell's discharge, Callahan told employee Benjamin Holland that Respondent had transferred Colwell to another job in order to "keep him away from the men because he had union cards on him." In the same conversation about Colwell, Callahan told Holland that Respondent "was waiting for him to slip up because Charlie [Browder] know he couldn't fire him because of the Union." In my view, these damaging statements, especially when viewed in the context of Respondent's extensive and serious unfair labor practices, constitute a virtual admission by Respondent that its motive was unlawful. In addition, I find the timing[14] of the discharge to be particularly telling. Colwell was discharged on August 26, the day after the Union requested recognition, 4 days after Respondent's massive illegal layoff of 25 of its 27 shop employees, and within 1 week of the Union's initial meeting with employees.

In spite of this evidence, my colleagues have accepted Respondent's contention that it discharged Colwell in accordance with its rule on absenteeism. In my view, Respondent's application of its rule is

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[12] Supervisor Butler acknowledged that Colwell was the employee he heard speak most often about the Union, and he testified that he informed other supervisors about Colwell's activities. Colwell was outspoken in his beliefs, and he personally told Butler that he would like to see the Union selected by the employees.

[13] Colwell told Supervisor Callahan on August 21 that he intended to solicit employees to sign authorization cards.

[14] See, generally, *TERA Advanced Services Corporation*, 259 NLRB 949, 951 (1982), and cases cited therein at fn. 5.

hardly a model of consistent enforcement. I note particularly that Respondent attempted to rely, in part, on the same rule to disguise its unlawful motive for discharging employee Popp. Further, as noted by the Administrative Law Judge, there were other occasions, before the union activity began, when Colwell missed work and failed to telephone Respondent. Although Respondent warned Colwell on two of those occasions, it did not choose to define his absences as "excessive" prior to the union activity, nor did it apply to him the rule's strict language that "unreported" absences "will" result in dismissal.[15] It was only after the initiation of union activity that Respondent reconsidered and decided to label his absences "excessive" and to apply strictly the telephoning requirement. Colwell's failure to report his absence merely provided Respondent with the "slip up" which it had been seeking so that it could establish a pretext to discharge Colwell. When viewed in conjunction with the record as a whole, Colwell's discharge was merely one phase of Respondent's massive unlawful campaign to thwart its employees' organizing drive. In view of the foregoing, I would find that the discharge violated Section 8(a)(3) and (1).

[15] I also note that, although Respondent denied Colwell's request for a wage increase on July 9, it included him in the wage increase given to several employees on July 28.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT interrogate employees about their membership in or activities on behalf of United Steelworkers of America, AFL-CIO-CLC.

WE WILL NOT threaten employees with discharge, plant closure, or other discrimination in order to discourage activity on behalf of the Union.

WE WILL NOT inform employees that their fellow employees have been laid off because of their activities on behalf of the Union.

WE WILL NOT warn employees not to sign union cards.

WE WILL NOT promulgate or maintain overly broad no-solicitation or no-distribution rules.

WE WILL NOT threaten to conduct, or conduct, surveillance of union meetings.

WE WILL NOT lay off or discharge employees in order to discourage membership in or activities on behalf of the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act.

WE WILL offer the following named employees immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole, with interest, for any loss of earnings and/or other benefits suffered by reason of our unlawful layoff of them on August 22, 1980:

Wayne Adams	Roscoe Johnson
Darrell Boggs	Billy Joe Leedy
Curt Brock	Beecher Morris, Jr.
Ernest Brock	Curt Morris
Curtis Brown	Danny Osborne
Carl Campbell	Delmar Scott
Roland Campbell	Melvin Sebastien
James Combs	Jerry Sexton
Michael Combs	Jimmy Sizemore
Johnny Everidge	Jerome Swalec
Lloyd Eversole	Daniel Watkins
Ezekiel Feltner	Taylor Whitehead
Rudolph Honeycutt	

WE WILL offer employee Jimmy Popp immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and WE WILL make him whole, with interest, for any loss of earnings and/or other benefits suffered by our unlawful discharge of him on September 23, 1980.

A & T MANUFACTURING COMPANY

DECISION

DAVID L. EVANS, Adminstrative Law Judge: This proceeding was heard before me at Hazard, Kentucky, on June 10 and 11, 1981, pursuant to complaints issued on November 14 and December 16, 1980.[1] Said complaints are based on charges filed by United Steelworkers of America, AFL-CIO-CLC (herein called the Union). The complaints, as amended at the hearing, allege various violations of Section 8(a)(1) and (3) of the Act by A & T Manufacturing Company (herein called Respondent). Respondent timely filed an answer admitting juris-

[1] Unless otherwise specified, all dates herein are in 1980.

diction and the status of certain supervisors, but denying commission of any unfair labor practices.

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent is a Kentucky corporation engaged in the fabrication and erection of coal processing and loading equipment at its Jeff, Kentucky, facility. During the 12 months preceding issuance of complaints, Respondent in the course and conduct of its business operations received goods and materials valued in excess of $50,000 directly from suppliers located in points outside the Commonwealth of Kentucky. The complaints allege, Respondent admits, and I find that Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

Respondent manufactures coal tipples, washing plants, and other coal mining equipment for various coal producers in Kentucky. It has shop employees who manufacture the equipment and field employees who install it (above ground) at the coal mining sites. The supervisors involved in this case are: Charlie Browder, president; Freddie Browder, vice president; Stephen Shepherd, general construction manager; Eli Collins, general construction superintendent; John Butler, electrical foreman; Homer Riley, concrete foreman; Vernon Brock, shop superintendent; and Matt Tuttle, shop foreman.

In mid-August some of Respondent's shop employees began discussing the possibility of an organizational attempt. On August 20, the Union held a meeting at the Combs Motel in Hazard, Kentucky. On Thursday, August 21, several employees talked about the Union among themselves in the shop and at the construction sites in the field. The Union also became a topic of conversation between supervisors and some of the employees. The General Counsel contends that in these conversations and subsequent conversations (and one conversation prior to the advent of the Union) enumerated *infra*, Respondent violated Section 8(a)(1) of the Act by interrogating employees, threatening them, and engaging in other coercive conduct.

On Friday, August 22, at 7 a.m., Respondent laid off 25 of its 27 shop employees. On August 25, Respondent, by Charlie Browder, received a letter from the Union requesting recognition as the employees' collective-bargaining representative. Browder denies knowledge of the union activity before receipt of this letter. On August 26, employee Delbert Colwell was discharged and, on September 23, employee Jimmy Popp was discharged. The General Counsel contends that the layoff and the two discharges were effectuated in violation of Section 8(a)(3). Respondent contends that it was motivated solely by economic considerations in laying off the employees and that Colwell was discharged because of a bad attendance record and Popp was discharged because of bad attendance and cursing Supervisor Matt Collins.

There can be constructed no logical sequence of the various alleged violations of Section 8(a)(1) of the Act. Therefore, I shall simply enumerate them generally in the order that the testifying employees were presented at the hearing.

1. *Jesse Johnson*: A Board-conducted election was held on October 17. Johnson testified that a couple of weeks before that election, while he was servicing one of Respondent's trucks, he was approached by Charlie Browder who asked him what he thought of the Union. Johnson told Browder that it made no difference to him. Johnson testified that Browder went on to say that "he couldn't work under a union, that most of his work was nonunion . . . he wasn't going to work under it, that he would just [sell] out before he would work under it." Johnson's testimony was undenied and credible. Contrary to the assertion in Respondent's brief, such threats are not licensed by the decision of the Supreme Court in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). While an employer may make predictions of adverse economic effects, "such predictions must be based on objective facts from which the employer can convey a reasonable belief as to demonstrably probable consequences of unionization." *Patsy Bee, Inc.*, 249 NLRB 976, 977 (1980). As in *Patsy Bee*, Respondent herein adduced no probative evidence that its nonunion customers would, or even might, terminate their business relationships with it if the employees selected the Union to represent them in collective bargaining. In fact, Respondent now recognizes the Union, and there was no suggestion during the hearing that its unsupported fears have materialized.

Accordingly, I find and conclude that by Charlie Browder's interrogating Johnson and threatening that Respondent would close its operations if the employees chose the Union to represent them, Respondent violated Section 8(a)(1) of the Act.

2. *Curtis W. Brown*: Brown testified that he was one of the employees laid off on August 22 and that when he went to the plant on August 29 to get his paycheck he met with Freddie Browder. At that time Browder told him "there was no work and they couldn't afford to build [sic] a union, and asked me how I felt about the Union . . . he said he would go to any extent to avoid a union. He said he couldn't afford to go a union . . . ." This testimony was undenied, and credible, and I find that by interrogating Brown and threatening to go to "any extent" to defeat the organizational attempt, Respondent violated Section 8(a)(1) of the Act.

3. *Roscoe Johnson*: Johnson was one of those laid off on August 22 but was recalled on August 27. He testified that when he came back in to work he was met by Charlie Browder who told him "he couldn't afford to go union, couldn't afford to pay union wages . . . if you want a union, he would have to shut down." This testimony is undenied, and credible, and I find that, by threatening plant closure, Respondent violated Section 8(a)(1) of the Act.

4. *Delbert Colwell*: Colwell, a field employee, testified that on August 21 he rode to work with Supervisor Eli Collins. Colwell testified that during the ride Collins asked if he had heard that there had been a union meeting the night before. Colwell replied that he did not know of one. Colwell further testified that on that day he heard Supervisor Homer Riley talking to employees. According to Colwell, Riley said that Charlie Browder "said if he caught anybody talking about the Union or want to sign a union card, he was going to fire them." Colwell further testified that during the same day Supervisor Corbin Callahan[2] approached him individually and asked "if I had a union card that I was going to get signed." Colwell replied that he did not have one but he was going to try to get some to get them signed. According to Colwell, Callahan replied: "Don't you know that they will fire you the first chance they get if you get the card signed . . . ." This testimony is undenied, and credible, and I find that, by this conduct of its supervisors, Respondent interrogated and threatened its employees in violation of Section 8(a)(1) of the Act.

5. *Curt Morris*: Morris, a shop employee, was laid off with the rest of the employees but recalled to work on August 27. Morris testified that on that date he attended a meeting of employees conducted by Charlie Browder wherein Browder said that "he had put too much work and sweat into the company to lose it, and he said he was going to fight the Union until hell froze over." Morris further testified that after the meeting, at a time when he and Charlie Browder were alone, Browder said that "He said he was going to meet with the labor board in a day or two, and he was going to demand to [see] them cards." This testimony is undenied, and credible, and I find that by Browder's remarks Respondent threatened the employees in violation of Section 8(a)(1) of the Act.

6. *Darrell Boggs*: Boggs testified that the employees had been discussing unions for about 2-1/2 months before the August 22 layoff. According to Boggs, some time in July when he was working in the shop he was asked by Vernon Brock what he thought about a union. Boggs replied that he really did not know. This testimony is undenied, and credible, and I find that by the interrogation Respondent violated Section 8(a)(1) of the Act.

7. *Benjamin Holland*: Holland, a field employee, testified that about 5:30 a.m. on August 22 when the employees were gathering to go to work at Respondent's "old" warehouse Steve Shepherd appeared. Although Shepherd lives next to the warehouse, Holland credibly testified that he had never seen Shepherd there that early before. Holland testified that as he and Callahan were driving from the warehouse to the jobsite, Callahan stated that Shepherd had been there that morning "to make sure employees wouldn't sign union cards." Holland further testified that as he and Callahan rode on the jobsite, Callahan stated "that the reason the shop was laid off was the Union." Finally, Holland testified that during that ride Callahan asked him if he were going to sign a union card. Holland further testified that on August 25, when he and Callahan were on the way to work in an automobile, Callahan stated that the reason Colwell was transferred to another job was "to keep him away from the men because he had union cards on him." According to Holland, Callahan further said, "they was waiting for him to slip up because Charlie [Browder] knew he couldn't fire him because of the Union." Holland further testified that Callahan stated that, "Charlie said that before he would let the Union come in, he would lease the shop to Steve Shepherd." Finally, Holland testified that 3 or 4 days after these conversations Callahan: "Took me into the truck one evening after work and aked me if I was going to sign a union card, and I told him no, and he said you're a good man, you save me a job." These statements, which are undenied, and credible, constitute interrogations, threats, and a warning against signing union cards, all in violation of Section 8(a)(1).

8. *Edward Mullins*: Mullins, a field employee, testified that when he was working on Respondent's Landmark project Supervisor Callahan asked him if he were going to sign one of the cards that Delbert Colwell was handing out. Since Colwell handed out cards from mid-August, when the union activity started, to August 26, at which time he was discharged, it is apparent that the question was asked about that time.[3] The question constitutes an interrogation in violation of Section 8(a)(1), and I so find and conclude.

9. *Jimmy Popp*: Alleged discriminatee Jimmy Popp was a field electrician until the time of his discharge on September 23. He worked under the supervision of John Butler who visited Popp's home on August 21 at a time when Popp was on vacation. According to Popp it was Butler who first informed him of the union activity. On August 25 Popp returned to work. As was his usual practice he rode to work with Butler. During the ride to work on that day, according to Popp, Butler told him: ". . . he had told Eli Collins that I wouldn't sign a union card, then he looked over at me and said, 'would you?'" Popp testified that he replied that he did not know. Then, according to Popp, Butler "told me if the Union was to come in, that Charlie Browder would close down his shop for 72 hours, and reopen in another name."

Popp further testified that on August 28, while he was working at the shop, Butler told him that Eli Collins had transferred Delbert Colwell from one jobsite to another to "get what he knowed about the Union out."

Popp further testified that about August 29 when he was on Respondent's Landmark job he was talking to Supervisor Corbin Callahan, who "called me over and asked me if [sic] which way I was going to vote for the Union, and I told him he could get in trouble for asking me that. And he said, I was told to ask . . . ."

Popp further testified that on the day following this exchange with Callahan he was approached at the Landmark jobsite by Supervisor Homer Riley and "he called me over and told me that there was going to be a union meeting that Friday, which then he replied that he was going to show up down there."

[2] Certain errors in the transcript are hereby noted and corrected.

[3] Contrary to the assertion in General Counsel's brief, it is not clear that this event occurred precisely on August 21.

This testimony by Popp about the conduct of Callahan and Butler is undenied and credible. As discussed below, Riley, in effect, denied Popp's testimony but I found Popp more credible than Riley. I find that by the actions described by Popp, Respondent interrogated and threatened its employees and warned its employees that its supervisors would conduct surveillance of union meetings, all in violation of Section 8(a)(1) of the Act.

10. *Carl Campbell and Delbert Colwell*: Campbell testified that he attended a union meeting conducted by the Union in a private dining area at the Shamrock Restaurant on August 29. According to Campbell, while the meeting was going on, he saw Riley "driving up and down the road, in front of the restaurant," with a woman in the car with him. According to Campbell he saw Riley do this "four or five times . . . about 18 minutes, 10 to 15 minutes. . . . He'd drive by and look over through there." Further, according to Campbell, when he and employees Delbert Colwell and Michael Combs left the meeting, they saw Riley sitting in the public dining section of the restaurant. Colwell testified in essential accord with Campbell, and specifically identified the woman with Riley as Riley's wife, but Combs was not asked about the incident. Riley was called as a witness by the General Counsel. He testified that he had overheard Jimmy Popp talking about the meeting at the Shamrock on the Landmark jobsite. Riley did not deny telling Popp that he would be at the meeting. When asked if he went to the Shamrock the next day, Riley testified, "Yeah, I believe I did stop in there and have a couple of beers." He was further asked by the General Counsel and testified:

> Q. Did you see any employees at the meeting?
> A. I didn't go into the meeting. I was at the bar beside the meeting.
> Q. Did you see any employees around the restaurant, outside, or in the general area?
> A. I didn't see anyone.

On cross-examination by Respondent's counsel, Riley testified that he regularly went to the Shamrock to drink beer on paydays. He further testified that on the night of the meeting his wife had dropped him off at the Shamrock, had driven to downtown Hazard, and picked him up later, and that this was a usual pattern of conduct for him and his wife.

Other than his bare statement, there is no evidence to support Riley's testimony that he and his wife were customarily in Hazard on Friday nights, and that she usually dropped him off at the Shamrock. Most significantly, Mrs. Riley was not called by Respondent to testify. Riley's statement that he did "believe" that he had been to the Shamrock was stated too casually to be credible; he assuredly knew his presence at the Shamrock that night was the issue about which he was called to testify—he knew for a fact that he was there on the night in question. Further, Riley was inconsistent in his testimony that he did not see anyone at the meeting, but knew that he was "at the bar beside the meeting." This and his general demeanor caused me to be unfavorably impressed by Riley. On the other hand, I found Colwell and Campbell credible. In sum, I find that Riley did exactly what he told Popp he was going to do; he went to the meeting, and made a point of doing so. The only conceivable reason for his presence there, and his driving back and forth in front of the Shamrock, was surveillance of the union meeting. This activity was surveillance of protected union activity, and by it Respondent violated Section 8(a)(1) of the Act.

Layoff of August 22

On August 22, Respondent laid off 25 of its 28 shop employees. Charlie Browder testified that on August 21, between 3:30 and 5 p.m., he and Freddie Browder made the decision to lay off all shop employees. No supervisor and none of the affected employees was forewarned of the layoff. When the employees reported to work on Friday, August 22, they were handed paychecks and a letter from Charlie Browder stating:

> Due to lack of work because of a slow down [sic] in the coal business we are forced to temporarily reduce our workforce [sic]. Unfortunately, we must lay you off for an undetermined period of time. As soon as work is available we will notify you as to when to report. We regret this inconvenience.

The employees were sent home at that point, not being allowed to finish out the day, nor the pay period. Charlie Browder acknowledged that in prior layoffs employees have been permitted to finish out the week.

When called by the General Counsel, Charlie Browder was asked and testified:

> Q. I take it the reason for the layoff is generally bad economy involving the coal mining industry?
> A. A combination of the bad economy and involving the coal mining industry and the fact that our biggest [project] was in serious financial difficulty.
> JUDGE EVANS: Which project was that?
> A. The USACO project.

Browder testified that he and Freddie Browder had been contemplating a drastic layoff for a long time before August 21 because of the bad economy. When asked when he first noticed the economy had been going bad, Charlie Browder replied:

> I started to notice it when my sales fell off about 75 percent a little over a year ago, when we had our first layoff. About 3 months before we had the first layoff, the sales dropped and we finished the jobs in process and had to lay people off.

In that layoff, which was January 29, 1979, 16 shop employees and 5 field employees were laid off. This was about one-half of the employee complement for the shop. Respondent had three other layoffs involving shop employees in 1979; six on March 5, two on October 26, and one on November 2. However, there were no subsequent layoffs of shop employees until the one in issue herein. Indeed, throughout 1980, the complement of the shop

steadily increased from 20 employees until it reached the point of 28 on August 22.

During the week following the layoff, Respondent began calling some of the shop employees back. No records were introduced upon which it can be determined as to just how many employees were called back that week, but employee Curt Morris testified that he and four other employees were called back that week, and worked 12 hours a day. Freddie Browder testified that employees were called back during that week to service a small contract which Respondent had received. Freddie Browder testified that after August 27 Respondent did no work on the USACO project except, as Browder explained, what was required to finish that portion which was almost complete. Freddie Browder credibly explained that this was done in order to obviate the necessity of moving from the shop to storage work which was almost complete, only to have it moved back to the shop for completion should Respondent have been able to sell it to another customer. Production which had been delivered to USACO was repossessed; some of it was sold to other purchasers, and the rest remained in Respondent's storage facilities.

In his letters to the employees, and at the hearing, Charlie Browder advanced two reasons for the layoff: general concern about the economy and lack of work caused by the loss of a principal customer, USACO. General concern about the economy had apparently been no more than academic until the inception of the union activity. Certainly there was nothing in the macro-economic sphere during the 1-1/2 years following Respondent's previous general layoff which forced Respondent to lay off employees in August 1980. Therefore, I discredit Charlie Browder's testimony that general concern about the economy was part of the reason for the layoff of August 22, and I shall consider this contention no further.

Respondent's second defense, if established, would be a complete defense to the allegation that the layoff violated Section 8(a)(3) of the Act. The loss of a principal customer could certainly justify partial, or complete, cessation of business operations. But here the customer was not lost; it just was not paying according to schedule. Taken at face value Respondent's defense is that it just could not afford to carry USACO any longer. Or, as Freddie Browder put, "we had to make the final decision that that was as far as we could come. Because the account was 90 days past due."

On April 18, Respondent received a $515,000 initial payment on a $3,900,000 contract with USACO, a coal producer. By May 2, Respondent had manufactured enough of the ordered equipment to have exhausted all of the funds theretofore advanced by USACO. On May 2, Respondent invoiced USACO for $74,286.82; on May 28, $307,699.70; and on July 7, $29,700 for a total as of that date of $411,000. On July 21, Respondent received from USACO a payment of $350,000, leaving a balance of $61,682.02. On August 1, Respondent invoiced USACO for another $148,450.68 for a then total of $210,136.70. Respondent received no payments from USACO during August and, on September 1, it invoiced USACO for $179,575.42 more for a total of $389,712.12. Therefore, Respondent's invoice of $74,286.20 on May 2, went 80 days without payment; the invoice of $307,699.20 went 54 days without payment before USACO paid $350,000 on July 21. That payment brought USACO to $61,686.02 in the arrears, but Respondent decided 30 days later that it could tolerate USACO's tardiness no longer. In other words, Respondent had carried USACO for larger amounts, for longer periods, when it decided it could carry USACO no longer on August 21. The issue is: why?

USACO had not, according to this record, served notice that it could not, or would not, ultimately pay Respondent what it owed. There is no evidence that USACO had gone bankrupt or out of the coal mining business. There is no probative evidence that Respondent could not meet any of its obligations because of USACO's payment practices.[4] Therefore the reason Respondent refused to carry USACO further does not appear to lie only in the relationship between the two business entities.

While, according to the Browder brothers, there had been rumors of union activity at Respondent's operations over the years, there is no evidence that any of the real, or only rumored, activity got so far as the conduct of a union meeting attended by employees.

On August 20, the Union conducted its first organizational meeting at the Combs Motel. In attendance were at least seven employees (Michael Combs, Darrell Boggs, Beacher Morris, Roscoe Johnson, Johnnie Eldridge, Delmar Scott, and Wayne Adams), each of whom worked in the shop. On the following day, authorization cards were distributed to employees both in the shop and in the field and, as I have found, on that day Collins interrogated Colwell; Riley told employees on a jobsite that Charlie Browder had said that anybody talking about the Union or had signed a card was going to get fired; and Callahan interrogated Colwell and told him: "Don't you know that they will fire you the first chance they get if you get the card signed." It is further noteworthy that on August 21, Supervisor Butler visited employee Jimmy Popp at his home and informed Popp that a union movement had begun.

Charlie and Freddie Browder denied knowledge of the employee union activity until receipt of demand for recognition on August 27. This is especially incredible in view of an admission by Charlie Browder that he had in the past instructed his supervisors to report all information about incipient union activities to him immediately. But even without such admission, knowledge of this by Supervisors Riley, Callahan, and Butler is imputable to the Browders.[5]

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[4] I discredit the testimony of Freddie Browder that the payroll for August 4–10 was paid with borrowed funds. Browder seemed not to know what counsel was talking about when it was first mentioned. He ventured that "probably" funds were borrowed to meet the payroll only after a blatantly leading question. Finally, no documentation was adduced by Respondent which, had a loan for that purpose been secured, must surely exist. *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) [Gyrodyne Co. of America] v. N.L.R.B.*, 459 F.2d 1329 (D.C. Cir. 1972).

[5] *N.L.R.B. v. Transport Clearings, Inc.*, 311 F.2d 519 (5th Cir. 1962).

There are also for consideration the statements made after the layoff which shed light on its true nature: On September 27, as Callahan and employee Holland drove to the jobsite early that morning of the layoff, Callahan told Holland, "that the reason the shop was laid off was the Union." Finally, all the other interrogations and threats to close the business if the employees organize, by Charlie Browder and the others, as enumerated above, evince a clear hostility towards the employees' exercise of their Section 7 rights. Therefore it is clear that the General Counsel has presented a *prima facie* case of unlawful motivation. However, Respondent was also motivated, at least in part by the desire to terminate its business relationship with USACO, a slow paying customer upon whom Respondent had made many demands for payment. Therefore this is a case of mixed motivation.

Reviewing the evolution of the case law of dual-motive cases culminating in the recent Supreme Court case of *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, the Board in *Wright Line, a Division of Wright Line Inc.*, 251 NLRB 1083, 1980 (1980), stated:

> Thus, for the reasons set forth above, we shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[14]

[14] In this regard we note that in those instances where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek toquantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or bullet between the eyes, if it [was] enough to determine events, it is enough to come within the proscription of the Act.

Clearly, the Union activity was the "straw that broke the camel's back." Respondent had carried USACO for up to 80 days for amounts up to $400,000. Yet Respondent never considered it to be in its best business interest to even submit an ultimatum to USACO before terminating the business relationship. Charlie Browder testified that he did not threaten USACO with termination of the contract because it would have been bad business to threaten such a large customer. This testimony is incredible; how much worse business can it be to go unpaid, or to terminate a contract altogether? Respondent had been content, if not pleased, to continue its business relationship, no matter how unsatisfactory, with USACO until the employees' organizational activity started. Then, without so much as forewarning to its own supervisors, and without allowing employees to finish the pay period (contrary to past practices), Respondent abruptly terminated 25 employees on the ground that it was *then* terminating its business with USACO.

Whether Respondent would have carried USACO longer or whether USACO would have paid up if Respondent had carried it longer are questions upon which I need not speculate.[6] However, it is clear that Respondent effectuated the layoff on August 22 because of the "straw" of union activity, and by such actions Respondent violated Section 8(a)(3) and (1) of the Act, as I so find and conclude.

Discharge of Delbert Colwell

Delbert Colwell was a field employee who reported directly to Corbin Callahan and Eli Collins. Collins and Callahan, in turn, reported to Project Superintendent Steve Shepherd. Colwell was first employed by Respondent in 1978 and quit some time during 1979. He was hired again in May 1980 and was fired on August 26.

John Butler was a supervisor at the Landmark project at which Colwell worked at the time of his second employment with Respondent. Butler was not Colwell's supervisor, but he and Colwell did ride to work together. Butler first denied ever talking to Colwell personally about the Union but then admitted that, as the men drove to work some time before Colwell was fired, Colwell would talk about the Union saying that he would like to see the Union selected by the employees. Butler further acknowledged in his testimony that the employee he heard talking most about the Union at the Landmark project was Colwell. He further acknowledged that he told other foremen about this but he would not say who the foremen were. Shepherd, who ultimately fired Colwell, denied knowledge of Colwell's union sympathies; however, in view of the knowledge possessed by Butler and the admission that he told other foremen about Colwell's activities, I cannot believe this, and I find that Shepherd did know about Colwell towards the Union at the time Colwell was discharged on August 26.[7] There is, as discussed above, other evidence of Respondent's knowledge of Colwell's sympathies. On August 21, Colwell told Callahan that he planned to solicit employee union cards and Callahan responded that Respondent would fire Colwell at its first opportunity; Callahan asked employee Ed Mullins about sometime before Colwell's discharge if he would sign a union card which Colwell might bring to the Landmark project. Finally Callahan told Holland on August 25 (a day Colwell was absent and the day before he was discharged) the Respondent was "waiting for him [Colwell] to slip up because (Browder) knew he couldn't fire him because of the Union."

It is undisputed that Colwell had a problem with attendance during his second tenure of employment with Respondent. It is undisputed that at all times material

[6] If, at the compliance stage of this proceeding, Respondent can show that there was a point beyond which it could not have carried USACO, or that USACO became totally unwilling or unable to meet its obligations to Respondent, this evidence will be taken into account.

[7] See also *N.L.R.B.* v. *Transport Clearings, supra.*

herein Respondent had had the following written attendance rule of which Colwell did not deny knowledge:

> REPORTING ABSENCE/TARDINESS
>
> In order for the Company to maintain a level of efficient operation, it takes the cooperation and consideration of all employees. This is especially true in regards to absenteeism and tardiness.
>
> Though absenteeism and tardiness are sometimes unavoidable, employees should make every possible effort to report to work on time when scheduled. If an emergency or illness occurs that prevents you from reporting to work, or reporting to work on time, you must telephone the Company as soon as possible on the day of absence/tardiness. If you are unable to contact your Supervisor, report your absence to the Personnel Department, who will in turn notify your Supervisor. When informing your Supervisor or the Personnel Department of your absence or tardiness also indicate to them when you expect to report to work. Notifying the Company of your absence or tardiness is not an automatic excuse. You will be expected to provide an acceptable explanation to your Supervisor when you return to work.
>
> Unreported absences, unexcused absences and/or excessive absences will result in dismissal.

Just how many days prior to August 26 Colwell did not show up for work and/or call in is not clear in the record. Colwell admits to missing 5 days before August 25 and resolutely stated that not once before that date did he call in to report his absence.

Colwell denied that he was ever warned about his attendance before his discharge. Shepherd, however, credibly testified that on July 9 he was approached by Colwell who was demanding a wage increase. Shepherd told Colwell that he did not come to work often enough to be evaluated for a raise. After that date Colwell missed 2 more days, July 12 and 19, which were recorded as unexcused absences in Respondent's file. On July 28, Colwell was given a 25-cent wage increase which several other employees were given at the same time.

Although Colwell denied ever being warned about absenteeism, Shepherd credibly testified that on July 30 he read "verbatim" the above-quoted attendance rule and told Colwell that he needed to improve his attendance. Further, according to Shepherd's credible testimony, Colwell replied that he "would try to work on it."

On August 25, Colwell was scheduled to work. He did not appear for his ride at 5:30 at the old warehouse and he made no attempt to call in and report his absence on that date.[8] He was fired for "excessive absenteeism" by Shepherd on August 26.

[8] In making this finding I discredit Colwell's testimony that he called in to Respondent's office about 10 o'clock that morning but the phone rang four times and no one answered. Even if it were true, the testimony acknowledges that Colwell was violating the requirement that "you must telephone the Company as soon as possible on the day of absence/tardiness." Furthermore, even if the testimony were true, there is no explanation offered by Colwell as to why he did not let the phone ring a fifth time or call back later.

In arguing that Respondent's discharge of Colwell was a violation of Section 8(a)(3), the General Counsel relies heavily on the animus expressed by Respondent's supervisors towards the organizational effort in general, and their expression of animus toward the actual or suspected activity of Colwell in particular. While it is clear that Respondent possessed animus, that does not give employees license to violate established rules of conduct which do not themselves interfere with the exercise of statutory rights.[9] Nor can Respondent be said to have condoned Colwell's attendance practices. By reading the rule Colwell was categorically warned by Shepherd that "unreported absences, or unexcused absences and/or excessive absences will result in dismissal." This warning was given 3 weeks before any organizational activity was undertaken by the employees. To the extent that Respondent could be said to have previously condoned Colwell's frequent absences, the condonation stopped with the warning of July 30.

Accordingly, I find and conclude that by the discharge of Delbert Colwell on August 26 Respondent did not violate Section 8(a)(3) or (1) of the Act.

Discharge of Jimmy Popp

Popp was employed as an electrician on Respondent's field crew from May 1978 until his discharge on September 23. He actively solicited support for the Union on the job. His activities on behalf of the Union were made the topic of a recorded conversation between Charlie Browder and him, a transcript of which was received in evidence. According to the transcript of their meeting which occurred on September 3:

> BROWDER: I've got something to say to you Jim; I'm going to put it on tape; I've got a witness here so that if it comes back up its told correctly. I'd like to say what I've got to say you listen and then you can say what you want to say, okay?
>
> POPP: Okay.
>
> BROWDER: I've been—It's been brought to my attention by some of my employees that you're working for the union trying to promote the union cause and so forth on my time and on my property and it's my right, my privilege to tell you that that's against the law.
>
> POPP: Yep.
>
> BROWDER: You are, as of right now, warned that if it's done again you'll be fired—no if's, no and's, no but's. I've got several people who'll sign statements you've done it so I feel that there's no warrant to discuss as far as whether you have or you haven't. It's your right to promote a union if you feel like that you want a union, however you can't do it on my property, you can't do it on my time, you can't do it on my job—that's the way the law reads. It's unfair labor practice as far as the union's concerned, according to what my attorney tells me. Now, this is something that we're going to fight with every legal means—you have every right to

[9] *Klate Holt Company*, 161 NLRB 1606, 1612 (1966).

want a union and to work for a union just don't do it while I'm paying you—don't do it on my property and don't do it on my job. Is that clear?

POPP: Yeah.

BROWDER: Okay.

POPP: I'll tell you what, I just went to one meeting and that was Friday to see what its all about. I've been talking to Corbin and boys up there and joking around with them.

BROWDER: Well, I'll tell you what I don't want to get into that because the situation is that I'm not trying to do anything to find out whether you are or whether you aren't. I don't really care what your position is as long as you pursue your position legally. If you want to visit peoples' homes or see them out here off of my property and promote the union cause that's your every, that's your right and I wouldn't want to interfere with it at all but I do demand that you, while you're taking my money and on my property, and on my job that you keep your organizational talent to yourself. That's about what I've got to say now. You can etc. . . . .

It has been noted that on August 22 as they were riding to work, Butler interrogated Popp as to whether he would sign a union card and threatened that Browder would close the shop for 72 hours and reopen in another name if the employees selected a union. And it has been further noted that Popp was interrogated by Corbin Callahan on August 27 about how he was going to vote in the upcoming union election.

On September 23, Popp was discharged by Charlie Browder. A transcript of the discharge interview was received in evidence and states as follows:

BROWDER: This is September 23rd, present Charlie Browder, Jimmy Popp, as a witness Brook Miller. This is a statement made to Jimmy Popp concerning his employment with A & T.

As of this morning, Jimmy, we're going to terminate you. The reason for this is—has nothing to do with your union activity. The reason for this is purely because of absenteeism and insubordination. Insubordination coming from incident that happened on my job approximately two weeks ago, I just recently found out about.

POPP: Tell me about it, I wanna find out about it.

BROWDER: An item which I can't allow to go on within my company because of the tendencies and the chances that it will lead to problems within the company.

POPP: What happened on the job?

BROWDER: The insubordination I'm talking about cussing, calling direct supervisors foul names and derogatory names is . . . .

POPP: When did I do that? Now I wanna know that cause I never called, I don't use foul language to nobody.

BROWDER: You didn't call Matt Collins a suck ass?

POPP: No I never.

BROWDER: You didn't call Corbin Callahan a suck ass?

POPP: Brown nose, but I was just joking with them, if they take it seriously now . . . .

BROWDER: You didn't tell . . . .

POPP: But it don't matter, it don't matter.

BROWDER: Well it does too. They're your supervisors.

POPP: No.

BROWDER: Jim, and that's the reason we're letting you go; we're not . . . .

POPP: But let me tell you something though we joke with them didn't you know they're out there wrestling like that and everything you don't know nothing like that.

BROWDER: Well, I know that when you're working for me and for my supervisors you've got to have enough respect for them not to call them foul names and for that reason plus the fact that you haven't been here for five days straight, I understand you have a baby. You called in two days during that time, three of the days you didn't call in. You told Eli you'd be back Friday and this is Tuesday.

POPP: No, no, no I never told Eli that.

BROWDER: It's recorded as to . . . .

POPP: Eli asked me if I was going to come back Friday, I said no I won't be able to—I went to the doctors Friday.

BROWDER: Well, I don't know what you do when you're off Jim, but I do know that we've got a job to do over there, we've got a dead line to make.

POPP: Maybe you're trying to call me a liar or nothing, but . . . .

BROWDER: No, I'm not trying to call you a liar, but I'm trying to say I've got a job to do; I've got a deadline to make and I can't do it if I don't have you on the job or somebody to replace you and I've got somebody coming to replace you; consequently, I don't need you on the job.

POPP: Alright.

BROWDER: And that is primarily because of your absenteeism and your derogratory [sic] remarks you made to my supervisors. That's all I've got to say on the subject.

When called as witness by the General Counsel Charlie Browder testified that he first heard about an incident between Supervisor Matt Collins and Popp from employee Lester Collins a few days before Popp was fired. Browder was extremely vague about the report he got from Collins. For example, he was asked and testified:

Q. Lester Collins told you that he heard what Popp had said?

A. I don't know if he heard it or not, I got the inference at the time he told me that he knew of it definitely. He didn't say he heard it.

Lester Collins testified, however, that Browder approached him and asked if he had heard Jimmy Popp

curse Matt Collins. According to Lester Collins he replied: "No, I didn't hear him cussing, but I have heard rumors that he was cussing Matt."

According to Matt Collins himself, on August 27, he and Callahan were at the Landmark job talking to each other when they were approached by Jimmy Popp. According to Collins, Popp "Just come and started to say something to Corbin and he said I better not say anything . . . because the brown nose suck ass is standing here and he will run and tell everything he knows." At that, according to Collins, "I turned around and walked down the stairs." There was no fight at the time. Neither Callahan nor Collins said anything about the incident to Popp. Collins did not report the matter to Charlie Browder and just how Browder came to hear about the incident is not clear in the record.

Popp was fired when he reported to work on Tuesday, September 23. Later in the day Browder secured from Collins a written statement basically to the effect of that which I stated above.

When called as a witness by the General Counsel Charlie Browder testified that although he "confirmed" the report of Popp's remarks to Matt Collins by the statement of Lester Collins a few days before, Popp was not fired until September 23 because that was the next time Popp reported to work. Browder was asked by the General Counsel and testified:

> Q. So any absence he had after you decided to discharge him, that wasn't why you discharged him?
>
> A. I made the decision to discharge him at the time I heard he had insulted my foreman, however, I would have discharged him anyway for missing that many days in a row without even following company procedure on it.
>
> Q. But as it was, you have already decided to fire him before any absence he might of [sic] had after that—the only reason you didn't tell him he was fired earlier, was that he wasn't there.
>
> A. Correct.

The General Counsel contends that Section 8(a)(1) was violated by Browder's imposition of overly broad no-solicitation and no-distribution rules on Popp's and other employees' activities. I agree.[10] The imposition these unlawfully broad rules and the other expressions of animus directed toward Popp and other employees as discussed herein fully reveal that Respondent was hostile toward the protected concerted activity of Popp and the other employees.

I further agree with the General Counsel that Respondent's reliance on the remark by Popp to Matt Collins is a sham. When the remark was made to Supervisor Collins in the presence of Supervisor Callahan, neither supervisor said anything to Popp about it. Nothing was said to Popp about it until the day of his discharge. The passing of 27 days constitutes a condonation of the conduct by Respondent's supervision and the later seizing upon the incident by Browder is clearly pretextual.

On the other hand, while Charlie Browder was engaged in a search for a pretext to discharge Popp, Popp handed him a valid reason. As the transcript of the September 3 meeting reflects, Popp was absent for 5 days in a row without calling in. As noted above in the case of Colwell, such absences are violations of Respondent's previously established rule and there is no evidence that Respondent had ever condoned such consecutive absences by Popp or any other employee.

While Respondent asserted an invalid and a valid reason for discharging Popp, it is clear that Respondent possessed and relied upon the absenteeism as a sufficient cause for the discharge, no matter how great the union animus Respondent bore.[11]

Accordingly, I find and conclude that by the discharge of Jimmy Popp on September 23 Respondent did not violate Section 8(a)(3) or (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent A & T Manufacturing Company is engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. United Steelworkers of America, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.
3. By interrogating its employees about their union activities, sympathies, or desires concerning representation by United Steelworkers of America, AFL-CIO-CLC, and by threatening plant closure, discharge, and other discrimination, by threatening to conduct surveillance of union meetings and by conducting surveillance of union meetings, by warning employees not to sign union cards, and by imposing overly broad no-solicitation and no-distribution rules upon its employees, Respondent has violated Section 8(a)(1) of the Act.
4. By its laying off the following named employees because of their known or suspected activities on behalf of the Union and/or because of a desire to discourage activity on behalf of the Union, Respondent has discriminated against its employees in violation of Section 8(a)(3) and (1) of the Act:

Wayne Adams	Roscoe Johnson
Darrell Boggs	Billy Joe Leedy
Curt Brock	Beecher Morris, Jr.
Ernest Brock	Curt Morris
Curtis Brown	Danny Osborne
Carl Campbell	Delmar Scott
Roland Campbell	Melvin Sebastien

[10] *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981).

[11] *Klate Holt Company, supra.*

James Combs	Jerry Sexton
Michael Combs	Jimmy Sizemore
Johnny Everidge	Jerome Swalec
Lloyd Eversole	Daniel Watkins
Ezekiel Feltner	Taylor Whitehead
Rudolph Honeycutt	

5. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act by discharging employee Delbert Colwell on August 26 and Jimmy Popp on September 23, 1980.

THE REMEDY

Having found that Respondent A & T Manufacturing Company has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist from engaging in such unfair labor practices. I shall also recommend to the Board that Respondent be required to take certain affirmative action in order to effectuate the policies of the Act. Such affirmative action includes the payment of backpay to all employees named in paragraph 4 of the "Conclusions of Law" section above. Backpay is to be computed on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as established by the Board in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]